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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996	)	
	)	CC Docket No. 94-129
Policies and Rules Concerning Unauthorized Changes in Consumers' Long Distance Carriers	)	

COMMENTS OF BELL ATLANTIC MOBILE, INC.

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COMMENTS OF BELL ATLANTIC MOBILE, INC.

Bell Atlantic Mobile, Inc. ("BAM")[1] submits these comments on the Further Notice in this proceeding,[2] and requests that the Commission clarify that the anti-slamming rules do not apply to providers of commercial mobile radio services ("CMRS") or to their activations of new CMRS subscribers.

SUMMARY

The Notice proposes changes to the Commission's current anti-slamming rules to implement new Section 258 of the Communications Act, as added by the Telecommunications Act of 1996. The current rules do not apply to CMRS

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[1]Bell Atlantic Mobile, Inc. is the managing general partner of Cellco Partnership, which owns or holds interests in cellular radiotelephone licenses and provides service in numerous markets nationwide.

[2]Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration, FCC 97-248 (released July 15, 1997) ("Notice").

providers, and there is no need to change this. Slamming of CMRS subscribers is not a public policy problem. CMRS providers do not operate in an "equal access" world where customers can have their selection of carriers changed without their consent. The terms "change order," "submit" and "execute," as used in the rules, are terms of art that do not apply to the subscriber activation process and contract arrangements in the CMRS industry.

The Notice appears to recognize this reality, and does not discuss whether or how the proposed rules might apply to CMRS providers. In fact it does not mention CMRS at all. Yet some of the language of the proposed rules could nonetheless be interpreted to require changes in the CMRS industry.

First, the Commission should declare that slamming is not a public policy problem that includes CMRS, that there is no history of slamming complaints (and no risk of complaints) justifying government intrusion into the competitive CMRS marketplace, and that the contract process by which CMRS carriers win customers provides adequate assurance that subscribers cannot be slammed.

Second, the Commission should take appropriate action to ensure that the new rules do not inadvertently retard the competitiveness of CMRS. It can do so in any one of several ways:

> -- It can apply its authority under Section 258 to exclude CMRS from the verification and other procedures required by the proposed rules.
>
> -- It can clarify the language of the final rules by, for example, defining "submission or execution of a change in a subscriber's selection" so as not to include a CMRS carrier's activation of a new subscriber.

-- It can forbear from applying Section 258 and the rules to CMRS, pursuant to Section 10 of the Communications Act.

Forbearance is the best route. The tests for forbearance are clearly met. Application of the rules to CMRS is unnecessary, given the absence of any history of slamming by CMRS providers and the manner in which CMRS providers attract new subscribers. Forbearance would also be consistent with the public interest, because Congress and the Commission have both found that it is in the public interest to refrain from regulating CMRS, unless intervention is clearly required. Slamming requirements for CMRS are clearly not required. Forbearance would also be consistent with other Commission decisions which forbore from applying other statutory provisions to CMRS.

I. SLAMMING IS NOT A PUBLIC POLICY PROBLEM FOR CMRS.

1. There is No History of Slamming By CMRS Carriers. Anti-slamming rules were never applied to CMRS because there was no history of slamming by CMRS providers. Even in the absence of such rules, BAM is not aware of any complaints which have been brought against CMRS providers alleging that they engaged in slamming themselves, or facilitated slamming by other carriers. None of the FCC's decisions addressing slamming identified it as a problem in the CMRS market. Given the absence of any public policy problem involving CMRS, regulatory intervention is unwarranted.[3]

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[3]The Commission's head enforcement official for CMRS, in reviewing the types of complaints that the Commission receives from wireless customers, did not

2. CMRS Slamming Cannot Occur Today. Slamming is made possible by the way in which landline services are provided. Unlike landline carriers, CMRS carriers do not "submit" or "execute" requests by subscribers to change their service provider. CMRS carriers do not control the landline network switching facilities which must be accessed to make such changes; those facilities are controlled by the incumbent LEC. The very problem that lies at the root of the Commission's own rules, and Section 258, is not a problem which CMRS providers can either create or resolve, because the change in IXC or landline CLEC is made by the LEC.

Nor can a CMRS provider "submit or execute a change in a subscriber's selection" of the subscriber's CMRS provider. When a customer of one CMRS provider wishes to change providers and become a customer of a different CMRS provider, the change is accomplished by the customer's termination of its service arrangement with the first provider and the customer's initiation of a new service arrangement with the second. The first provider does not submit, or execute, a change in its subscriber's service arrangements. Thus, from a technical viewpoint, it is not possible to "change" a wireless customer's account, as that term is used in the slamming context, without the customer's direct and continuing involvement. The nature of the technology inherently provides more than adequate verification

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mention receiving any slamming complaints at all, nor did he identify slamming as a concern. Remarks of Howard Davenport, Chief, Enforcement Division, Wireless Telecommunications Bureau, FCC, to Personal Communications Industry Association, September 18, 1996.

of the customer's genuine intentions.

In addition, none of the cellular and PCS handsets can by "changed" to a competing CMRS carrier without being physically reprogrammed by the customer. Many of them operate on incompatible radio technologies (AMPS, GSM, CDMA, TDMA) and are physically unable to "change" to a different carrier's technology at all, so a customer who decides to change carriers must purchase new equipment.

From a sales and operational viewpoint, a wireless carrier's success in winning customers from rival carriers involves a necessary and burdensome customer verification process designed to protect against fraud and bad debt. Credit checks, driver's license verification and customer signatures are tools frequently used to protect the carrier. These processes also protect customers from use of their names against their will by third parties.

The wireless business is characterized by aggressive comparison shopping by customers. "Churn" rates of customers leaving a CMRS carrier for various reasons (involuntarily due to nonpayment, or voluntarily due to change of address or competitive reasons) typically are in the range of 12% to 25% annually. Yet BAM is unaware of any consumer complaints which concern surreptitious changing of customers' service providers by unauthorized third parties.

There is thus no reason for Section 258 to apply, because it is intended to address a situation where the carrier actually providing service to the customer is changed without the customer's knowledge or approval. A change in a subscriber's CMRS provider, however, can happen only with the express approval and express

direction of the customer. The absence of CMRS slamming problems notwithstanding the lack of applicable anti-slamming rules confirms that no regulatory intervention is justified.

3. Slamming Results from Mandated Equal Access, Which Does Not Exist for CMRS. The Notice (at ¶ 5) acknowledges that imposition of the landline equal access regime was the predicate for the Commission's initial anti-slamming rules. The LEC equal access regime created the potential for slamming; the anti-slamming rules were the response.

That predicate, however, does not fit CMRS, because the provision of CMRS is not subject to equal access. To the contrary, Congress decided there was no need for equal access regulation of CMRS customers' selection of long distance service providers. The 1996 Act added Section 332(c)(8) to the Communications Act, which mandates that CMRS providers "shall not be required to provide equal access to common carriers for the provision of telephone toll services." 47 U.S.C. § 332(c)(8). The inescapable conclusion is that Congress does not believe provision of equal access by CMRS providers is necessary to assure that CMRS practices in connection with interexchange carrier selection are lawful. Given that the equal access premise for the anti-slamming rules does not exist with regard to CMRS, the rules should also not apply to CMRS.

Furthermore, the Commission recently decided that market forces should govern CMRS carrier selection. It found that the practices of CMRS providers, even in the absence of specific regulatory obligations, are just, reasonable, and

nondiscriminatory, and that no government intrusion was appropriate. Section 332(c)(8) also provides that:

> If the Commission determines that subscribers . . . are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll service of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism.

In its proceeding implementing this provision, the Commission did not find either that subscribers are being denied access to the provider of toll services of their choice or that any such denial is contrary to the public interest. In fact, it concluded that the record did not establish a need for any access or "unblocking" rule, or even for an inquiry into whether such a rule would be appropriate.[4]

4. Detailed Anti-Slamming Rules Would Hinder CMRS Competition. It would also be anticompetitive to impose the detailed rules proposed by the Notice, with their prescribed verbiage and types of forms, onto the contract formation process in the wireless business. Aside from the fact that these requirements do not fit at all with the way that wireless service is sold, they would intrude on pro-competitive marketing initiatives made on the basis of competitive judgments of individual carriers to differentiate themselves from competitors.

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[4]Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Order, FCC 96-126, released March 22, 1996.

There is vigorous competition among wireless carriers over the form and content of individual customer service agreements, as well as the contract formation process ("annual service contract required" vs. "no contract to sign"), and the contract termination process ("$200 early cancellation fee" vs. "no long-term contract or termination fee"). BAM is aware of no CMRS carrier which customarily offers to act as a new customer's agent in terminating service with a former CMRS carrier, or that does business with other carriers purporting to act on customers' behalf under "letters of agency." To the contrary, every CMRS carrier attempts to preserve customers who call to terminate by offering competitively beneficial equipment upgrades or price plans. These are precisely the types of competitive market forces that Congress and the FCC have decided should govern provision of CMRS rather than government regulation.[5]

II. THE COMMISSION SHOULD ENSURE THAT THE SLAMMING RULES DO NOT INTERFERE WITH CMRS COMPETITION BY STATING THAT THE RULES DO NOT APPLY TO CMRS.

The Commission can ensure that the slamming rules are not inadvertently read to reach CMRS by taking one of several courses of action in this proceeding.

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[5]Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b) (1993); Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988, 8002 (1994) (FCC should "ensure that the marketplace -- not the regulatory arena -- shapes the development and delivery of mobile services.").

A. Application of Section 258.

The Commission can first prevent the slamming rules from interfering with the competitive subscriber process for CMRS by deciding that CMRS is outside the scope and intent of new Section 258. Congress recognized that local exchange competition would be developing as a result of the interconnection provisions of the 1996 Act (47 U.S.C. §§ 251-52), and that the same problems of unauthorized changes of consumers' landline long distance carriers could arise in the context of local exchange carrier competition. Section 258 was intended to extend the protections of the Commission's pre-existing anti-slamming rules to customer selections of local exchange carriers. Nothing in that provision indicates that Congress perceived that slamming was a problem in the wireless market which required intervention.

This conclusion is compelled by the legislative history of Section 258, which originated as Section 251 of the House bill. The Conference Committee Report on the 1996 Act states that the House provision was accepted, and describes that provision as follows:

> Section 251 requires the Commission to adopt rules to prevent illegal changes in subscriber selections, a practice known as "slamming." The Commission has adopted rules to address problems in the long distance industry of unauthorized changes of a consumer's long distance carrier. The House provision is designed to extend the projections of the current rule to local exchange carriers as well.

H.R. Rep. No. 104-458, 104th Cong., 2d sess. 136 (1996).

CMRS was not subject to the Commission's anti-slamming rules in existence

prior to enactment of the 1996 Act. The applicable regulations began, "No IXC shall submit to a LEC a primary interexchange carrier (PIC) change order generated by telemarketing unless and until the order has first been confirmed in accordance with the following procedures . . . ." 47 C.F.R. § 64.1100. CMRS providers, of course, do not submit PIC change orders to LECs and are themselves not LECs.[6] Thus, CMRS providers were not subject to these rules. This holds true today. CMRS providers are still not involved in either the submission or the execution of change orders for the selection of their subscribers' landline long distance or local exchange carrier. Slamming was never a CMRS issue, and is not one now. Section 258's extension of the anti-slamming rules to reach LECs thus does not encompass CMRS.[7]

In addition, Section 258 is not self-executing, and in and of itself does not impose any requirements. Rather, it directs the Commission to decide what requirements should be adopted, and states that carriers may not execute change orders "except in accordance with such verification procedures as the Commission shall prescribe." The Commission clearly has the authority to determine itself the

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[6]The Commission has confirmed that wireless providers are not LECs in their provision of wireless service. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) at ¶ 1004 ("We are not persuaded by those arguing that CMRS providers should be treated as LECs, and decline at this time to treat CMRS providers as LECs."). This finding was not challenged in the appeals from the First Report and Order.

[7]A CMRS provider could decide to offer landline service independent of CMRS. To the extent it does so, it would be subject to Section 258 and the Commission's anti-slamming rules.

scope of anti-slamming rules. Given that (unlike in the landline situation) a change in a subscriber's CMRS carrier occurs only with the express approval of the customer, pursuant to a service agreement with his or her CMRS carrier, there is no reason for Section 258 to be applied. Section 258, in short, does not require the Commission to impose those rules on the provision of CMRS.

B. Modifications to the Language of the Slamming Rules.

The Commission can also ensure that the anti-slamming rules are not perceived to reach CMRS by making changes in the language of the rules.

The Commission should, for example, clarify that Section 258 does not apply to the solicitation of customers by wireless carriers, a provider's entry into a service agreement with a customer, or the termination of that agreement. These actions do not constitute the submission or execution of an order to "change" the subscriber's choice of provider. Section 258 applies only to such "change" orders, because in that context there is an "executing" carrier in the position to make the change. Neither CMRS carrier, by contrast, "submits" or "executes" any "change" in its subscriber's service arrangements from one to the other. By convincing a customer to activate service and entering into a contract with that customer, the carrier does not thereby "execute" a "change" if the customer happens to be a former customer of some other carrier. The rules can be modified to define the terms of art they employ -- "submit," "execute" and "change" -- to exclude the contract-driven customer activation process used by CMRS providers.

C. Forbearance From Applying Section 258 to CMRS.

The best route to ensuring that the anti-slamming rules do not have an unintended impact on the CMRS market is to explicitly forbear. Even if Section 258 could be read as reaching CMRS, new Section 10 of the Communications Act, which was also added by the 1996 Act, requires the Commission to forbear from so applying it. Section 10 provides in pertinent part:

> [T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any of some of its or their geographic markets, if the Commission determines that --
>
> > (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> >
> > (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
> >
> > (3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a). Section 10(a) "*requires* the Commission to forbear from applying any provision of the Communications Act or from applying any of its regulations" if the three-part test for forbearance is satisfied. H.R. Rep. No. 104-458, *supra,* at 184-85 (emphasis added).[8]

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[8]While Section 10 includes a process by which parties may also petition for forbearance, it does not require the Commission to await such a petition before determining whether it must forbear. The Commission may do so as part of a

Part I of BAM's Comments, *supra,* explained why extension of slamming rules to wireless services is "not necessary" to ensure that CMRS practices are just and reasonable, or to ensure that consumers are protected. Because of the distinct technical and operational realities as to how CMRS is provided, wireless carriers are not able to slam a customer as are IXCs in the landline context. Nor are they comparable to LECs or CLECs who, with the onset of local competition, may be able to engage in slamming. The need for regulatory intervention to deter incentives for landline slamming does not exist for CMRS.

Forbearance from applying the anti-slamming rules to CMRS would also be "consistent with the public interest," thus meeting the other test of Section 10. In effect, Congress has already made this finding. As discussed above, Section 332(c)(8) of the Communications Act provides that CMRS providers shall not be required to provide equal access to providers of toll services. If Congress thought that it was in the public interest to saddle CMRS providers with regulatory requirements relating to their customers' selection of interexchange service providers, it would not have enacted Section 332(c)(8). Part I of BAM's Comments show in addition why imposing rigid, detailed rules would hinder competition.

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rulemaking. Moreover, the Commission has already forborne in part from enforcing a different provision of the Act, Section 254(g), as part of its rulemaking to implement that provision. Policy and Rules Concerning the Interstate Inter-exchange Marketplace, CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564 at ¶ 27 (1996) ("We forbear from applying Section 254(g) to the extent necessary to permit carriers to depart from geographic rate averaging to offer contract tariffs . . . ."). The Commission should follow the same procedure here, and exercise its forbearance authority in implementing Section 258.

Clarifying that the slamming rules do not apply to CMRS would also be consistent with the public interest, because Congress and the Commission have both found that it is in the public interest to refrain from regulating CMRS, unless intervention is clearly necessary, and that is the case here. Under the federal regime for CMRS regulation, clear evidence of the need for government intervention is required before new rules are to be imposed on CMRS. Nothing in the history of the anti-slamming rules, or in the Notice -- let alone the requisite compelling evidence -- supplies any basis for imposing the new anti-slamming rules on CMRS.

In its 1993 amendments to the Communications Act, Congress adopted a new, deregulatory approach to commercial mobile services, which was to be distinct from regulation of landline services.[9] Congress expressly found that regulation can undermine the public interest, by distorting and impairing competition. Minimal regulation, it found, was in the public interest because it would promote vigorous competition, enhance service and stimulate innovation. Any regulation of the CMRS industry must meet a demonstrated need.[10]

In its subsequent decisions on CMRS regulation, the Commission has repeatedly found that CMRS regulation must be clearly justified by evidence that government intervention was needed, and must also be narrowly written to solve

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[9]Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b) (1993).

[10]See H. Rep. Rep. No. 103-111, 103d Cong., 1st Sess. 259-60 (1993); H. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 494 (1993).

an identified problem in the competitive CMRS market: "Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need."[11] For example, in revising its rule governing resale of CMRS (47 CFR § 20.12), the Commission "narrowly tailored" the rule to address the problem identified in the record, and noted, "The resale rule, like all regulation, necessarily implicates costs, including administrative costs, which should not be imposed unless clearly warranted."[12]

The Notice in this docket is silent on CMRS. The Commission did not mention CMRS at all, let alone identify problems with slamming in the CMRS market.[13] There is no basis, let alone the requisite compelling need, for extending

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[11]In Re Petition of the Connecticut Dep't of Public Utility Control, Report and Order, 10 FCC Rcd 7025, 7031 (1995), *aff'd,* 78 F.3d 842 (3d Cir. 1996). In many other decisions, the Commission has expressed its policy of not imposing CMRS regulation except where clearly warranted. See Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1418 (1994) "We establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees"); Third Report and Order, 9 FCC Rcd 7988, 8002 (1994) (CMRS regulations should "ensure that the marketplace -- not the regulatory arena -- shapes the development and delivery of mobile services.").

[12]Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 15499 (1996) at ¶ 14.

[13]The Notice reviews the history of slamming problems, but all concern the submission of false landline IXC changes to LECs, which is irrelevant to CMRS. Even when the Notice discusses the potential for slamming in the local exchange market, it addresses only LECs, not CMRS providers (which are not LECs). E.g., Notice at ¶ 7 ("Competition will fundamentally change the role of LECs"); at ¶ 15 (asking "whether incumbent LECs should be subject to different requirements").

the anti-slamming rules to CMRS. The Commission could not apply the rules to CMRS providers without contradicting the fundamental policy commitments it (and Congress) have already made to strictly limit government intrusion into the provision of CMRS.

Forbearance would also be consistent with other Commission decisions which forbore from applying other statutory provisions to CMRS. In the 1993 amendments to the Communications Act, Congress added new Section 332(c)(1)(A), which granted the Commission the authority to forbear from any provision of Title II other than Sections 201, 207 and 208.

Following enactment of Section 332(c)(1)(A), the Commission forbore from Section 203, 204, 205, 211, 212 and 214.[14] It found, for example, that tariffing obligations under Section 203 should be removed because "tariffs are not essential to our ability to ensure" that carriers do not engage in unlawful discrimination.[15] Anti-slamming rules involve an even clearer case for forbearance than did the tariffing rules, because not only are they not "essential" for CMRS; they are not even relevant.

Given Congressional and Commission policy that limited regulation of CMRS is in the public interest, and that unneeded regulation harms the public interest, forbearance from applying anti-slamming rules to CMRS is required.

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[14]Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1463-81 (1994).

[15]Id., 9 FCC Rcd at 1479.

CONCLUSION

The Commission should declare that, because there is no public policy problem concerning consumers' selection of their provider of commercial mobile services, Section 258 and the rules being adopted to implement that provision will not be applied to CMRS. It should clarify those rules to ensure that CMRS providers are not subject to unnecessary new regulation.

Respectfully submitted,

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